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8 CALIFORNIA VALLEY MIWOK TRIBE

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 CALIFORNIA VALLEY MIWOK TRIBE,

12 Plaintiff,

13 v.

14 THE CALIFORNIA GAMBLING  
15 CONTROL COMMISSION; and DOES  
16 1 THROUGH 50, Inclusive,

17 Defendants.

Case No. 08 CV 0120 BEN AJB

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS THE  
COMPLAINT; MEMORANDUM OF POINTS  
AND AUTHORITIES**

DATE: March 10, 2008

TIME: 10:30 A.M.

COURTROOM: 3

LOCATION: 940 Front Street  
San Diego, A 92101

JUDGE: Hon. Roger J. Benitez

18  
19 Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or "the Tribe" or "Plaintiff")  
20 submits the following Memorandum of Points and Authorities in opposition to Defendant  
21 The California Gambling Control Commission's ("the Commission") Motion to  
22 Dismiss the Complaint.

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## I.

**INTRODUCTION**

This is a suit for equitable relief as it pertains to the Commission's duty under California State law to distribute Revenue Sharing Trust Fund ("RSTF") money to a federally recognized, unorganized, non-compact Indian Tribe. Here, Plaintiff merely seeks a judicial declaration that the Commission must continue to pay it RSTF money, despite its present status of being recognized by the Bureau of Indian Affairs ("BIA") as "unorganized" due to the Tribe's ongoing Tribal leadership dispute.

The suit seeks no compensatory relief in the form of monetary damages.

## II.

**RELEVANT FACTUAL ALLEGATIONS**

In 1994, Plaintiff was placed on the list of federally recognized tribes when Congress enacted the Federally Recognized Tribe List Act. Plaintiff was never removed from that list. As such, it continues to be a federally recognized Tribe.

In September of 1999, the State of California and various Indian Tribes in the State entered into what has been referred to as a "Tribal-State Gambling Compact" (hereinafter referred to as "Compact"), which enabled various "Compact" Tribes to operate gambling casinos on their reservations.

The Compact requires that the "Compact" Tribes contribute a certain percentage of their casino winnings to the State for placement in two separate funds, the Special Distribution Fund ("SDF") and the RSTF. This dispute involves the RSTF. The money placed in the RSTF is earmarked for Non-Compact Tribes who have less than 350 slot machines or no gambling facilities at all. Plaintiff has no gambling casinos.

Under State law, the RSTF money is placed in the State Treasury and designated as the "Indian Gaming Revenue Sharing Trust Fund". The Commission, a State agency, is charged with the responsibility under State law to distribute to Non-Compact Tribes, like Plaintiff, in accordance with the distribution plans specified tribal-state gaming compacts. Cal. Gov. Code Section 12012.75. The "distribution plans" under the

1 Compact specify the Commission's duties in paying out RSTF money to Non-Compact  
2 Tribes, like Plaintiff.

3 Under Section 4.3.2.1 of the Compact, the Commission is to pay each Non-  
4 Compact Tribe \$1.1 million per year, and if there is not enough money in the RSTF to  
5 pay each Non-Compact Tribe this amount, then the funds are to be distributed in equal  
6 shares. However, Cal. Gov. Code Section 12012.90(d) was later enacted to require the  
7 Commission to take funds from the SDF to make up any shortfall in RSTF money, i.e., so  
8 as to insure that each Non-Compact Tribe receives its full entitled share. Under Section  
9 4.3.2.1(b) of the Compact, the Commission has no discretion as to how the RSTF money  
10 is to be disbursed.

11 In late 1999, a leadership dispute arose within the Miwok Tribe that continues to  
12 the present day. In addition, beginning in October of 2001 the Tribe and the BIA  
13 disputed how the Tribe should be "organized" with respect to a governing constitution.  
14 The dispute concerning the Tribe's constitution resulted in the Tribe suing the BIA in the  
15 U.S. District Court in Washington D.C., seeking a judicial declaration that the BIA could  
16 not interfere with the Tribe's right to establish its own constitution. The U.S. District  
17 Court, however, dismissed the Complaint, concluding that the BIA could request the  
18 Tribe to establish a constitution under certain guidelines. The U.S. District Court made  
19 no ruling on whether the Tribe was no longer "federally recognized", or whether Sylvia  
20 Burley, or anyone else, was an official representative of the Tribe.

21 In March of 2004 (prior to the U.S. District Court suit), the BIA wrote the Miwok  
22 Tribe to advise that although it considered the Tribe to be "unorganized", it still  
23 recognized Sylvia Burley, the former Tribal Chairperson, to be the official representative  
24 of the Tribe, or otherwise a "person of authority". To date, the BIA has never withdrawn  
25 that statement, even despite the U.S. District Court's decision dismissing the Tribe's suit.

26 In October of 2004, a former Tribal Councilmember, Yakima Dixie, who has  
27 challenged (and continues to challenge) the Miwok Tribe leadership, sued the  
28 Commission for a Temporary Restraining Order ("TRO"), seeking to restrain the

1 Commission from further distribution of RSTF money to the Tribe via Sylvia Burley. The  
2 Commission opposed the suit, arguing that despite the Tribe being “unorganized”, Sylvia  
3 Burley was still considered a person of authority for the Tribe by the BIA, and therefore it  
4 was obligated to continue making RSTF payments to the Tribe via Ms. Burley. (See Ex.  
5 3 to Defendant’s Request for Judicial Notice). Yakima Dixie’s request for a TRO was  
6 denied, and the Commission continued to make quarterly RSTF payments to the Tribe  
7 via Sylvia Burley, until August 4, 2005, two weeks after the BIA suspended the Tribe’s  
8 federal (PL 93-638) contract funds, after the BIA’s efforts to resolve the Tribe’s internal  
9 leadership dispute failed and the Tribe still had no governing constitution acceptable to  
10 the BIA. Despite having suspended the Tribe’s federal contract funds, the BIA continued  
11 to recognize the Tribe as an “unorganized” Tribe and Sylvia Burley as its official  
12 representative.

13 The Commission’s decision to withhold the Tribe’s RSTF money on August 4,  
14 2005, was inconsistent with its previous position as highlighted in its opposition papers to  
15 Yakima Dixie’s TRO application. The Commission informed the Tribe at that time that it  
16 would be withholding the Tribe’s RSTF money until the Tribe’s leadership was firmly  
17 established. Later, in December 2005, the Commission filed an interpleader action  
18 against Sylvia Burley, Yakima Dixie, and others it thought to be involved in the Tribal  
19 leadership dispute, seeking to get the State Superior Court to make a determination on  
20 whether the Tribe was properly organized and to resolve the Tribe’s internal leadership  
21 dispute. It sought no relief with respect to its duties and responsibilities in disbursing  
22 RSTF money, however. As a result, the Commission’s interpleader action was denied  
23 on June 16, 2006.

24 The Commission has inexplicably decided to withhold RSTF money from Plaintiff,  
25 because it is “unorganized” or otherwise because the BIA purportedly does not recognize  
26 Sylvia Burley as an authorized representative of the Tribe. However, the BIA still  
27 recognizes the Tribe, even though it is “unorganized”, the Tribe has never been taken off  
28 of the federally recognized list of tribes pursuant to the Federally Recognized Indian

1 Tribe List Act of 1994, and the Compact does not disqualify a Non-Compact Tribe from  
 2 receiving RSTF money because it is “unorganized”. Indeed, the Compact does not  
 3 require the Commission to determine whether a Non-Compact Tribe is “organized” prior  
 4 to making RSTF distributions. Moreover, the Compact specifically defines a “Tribe” as a  
 5 “federally-recognized Indian tribe, or an authorized official or agency thereof.” Under this  
 6 definition, the Miwok Tribe still qualifies for RSTF distributions. Even though it may be  
 7 “unorganized”, it still remains federally recognized, and the BIA has never withdrawn its  
 8 position that Sylvia Burley is an authorized representative of the Tribe. It is for these  
 9 reasons that Plaintiff contends that the Commission’s actions in withholding its RSTF  
 10 money is erroneous, and requests a judicial determination in State Court that the  
 11 Commission has a duty to resume those payments to Plaintiff.

12 Presently, Yakima Dixie is incarcerated in the Deuel Vocational Institution in  
 13 Tracy, California.

### 14 III.

#### 15 **DISMISSAL OF CERTAIN CLAIMS**

16 After the Commission removed this case to the U.S. District Court, Plaintiff filed a  
 17 FRCP 41(a)(1) Notice of Dismissal of its Third Cause of Action for Breach of Contract  
 18 and its Fourth Cause of Action for Breach of Fiduciary Duty. Thus, no “compensatory”  
 19 damages are sought.

### 20 IV.

#### 21 **SUMMARY OF LAW ON RULE 12(b) MOTIONS TO DISMISS**

22 The Commission has moved to dismiss the Complaint pursuant to FRCP 12(b)(1),  
 23 12(b)(6) and 12(b)(7). The following is a summary of the law in connection with such  
 24 motions in federal court.

#### 25 **A. Rule 12(b)(1): Dismissal for Lack of Subject Matter Jurisdiction**

26 The Complaint is subject to dismissal under FRCP 12(b)(1), if the court lacks the  
 27 statutory authority to hear and decide the dispute. This includes where there is no  
 28 federal question at issue, if the parties are not completely diverse, or if the amount in



1 controversy does not exceed \$75,000.

2 In evaluating subject matter jurisdiction attacks, the court ordinarily construes the  
3 complaint liberally, accepts all uncontroverted, well-pleaded factual allegations as true,  
4 and views all reasonable inferences in plaintiff's favor. Whisnant v. United States (9<sup>th</sup>  
5 Cir. 2005) 400 F.3d, 1177, 1179. Whether subject matter jurisdiction exists is  
6 determined as of the date the lawsuit was filed. Grupo Dataflux v. Atlas Global Group,  
7 L.P. (2004) 541 U.S. 567, 574, 124 S.Ct. 1920, 1925.

8 **B. Rule 12(b)(6): Dismissal For Failure To State A Claim Upon Which**  
9 **Relief Can Be Granted**

10 A motion to dismiss for failure to state a claim has its roots in the common law  
11 demurrer. See De Sole v. United States (4<sup>th</sup> Cir. 1991) 947 F.2d 1169, 1178, fn. 13.  
12 Like a common law demurrer, it tests the legal sufficiency of the allegations in the  
13 complaint.

14 A claim is subject to dismissal under FRCP 12(b)(6) where it either asserts a legal  
15 theory that is not cognizable as a matter of law or because it fails to state sufficient facts  
16 to support a legally cognizable claim. See SmileCare Dental Group v. Delta Dental Plan  
17 of Cal., Inc. (9<sup>th</sup> Cir. 1996) 88 F.3d 780, 783. However, when ruling on a 12(b)(6) motion  
18 to dismiss, the court assumes the truth of the allegations pled in the complaint, resolves  
19 all doubts and inferences in the plaintiff's favor, and views the pleadings in the light most  
20 favorable to the non-moving party. Jackson v. Birmingham Bd. Of Educ. (2005) 544 U.S.  
21 167, 170-71, 125 S.Ct. 1497, 1502-03.

22 In ruling on a motion to dismiss for failure to state a claim, the court reads the  
23 allegations in the complaint liberally, and will dismiss only when the pleadings show on  
24 their face "some insuperable bar to relief". Strand v. Diversified Collection Serv., Inc. (8<sup>th</sup>  
25 Cir. 2004) 380 F.3d 316. Such dismissals are disfavored and are not routinely granted.  
26 Test Masters Educ. Serv. V. Singh (5<sup>th</sup> Cir. 2005) 428 F.3d 559,570. To this end, a claim  
27 will only be dismissed under Rule 12(b)(6) if it appears beyond doubt that the pleader  
28 can prove no set of facts in support of the claim that would entitle the pleader to relief.

1 Conley v. Gibson (1957) 355 U.S. 41, 78 S.Ct. 99.

2 Neither will the court dismiss a claim under Rule 12(b)(6) merely because the  
3 court doubts the pleader's allegations or suspects that the pleader will ultimately not  
4 prevail at trial. See Ideal Steel Supply Corp. v. Anza (2d Cir. 2004) 373 F.3d 251, 264.  
5 Indeed, the courts are particularly hesitant to dismiss at the pleading stage those claims  
6 advancing novel legal theories, reasoning that the claims could be better examined  
7 following development of the facts through discovery. See McGary v. City of Portland  
8 (9<sup>th</sup> Cir. 2004) 386 F.3d 1259, 1270.

9 Lastly, plaintiffs need not anticipate the defendants' likely defenses, nor attempt to  
10 preemptively "plead around" them in the complaint. See Hollander v. Brown (7<sup>th</sup> Cir.  
11 2006) 457 F.3d 688. The viability of plaintiff's claims is not dependent upon whether the  
12 defendant has a defense. See United States v. Northern Trust Co. (7<sup>th</sup> Cir. 2004) 372  
13 F.3d 886, 888. Thus, plaintiff's failure to "plead around" a likely defense is typically not a  
14 proper basis for dismissal. See Xechem, Inc. v. Bristol-Myers Squibb Co. (7<sup>th</sup> Cir. 2004)  
15 372 F.3d 899, 901.

16 **C. Rule 12(b)(7): Dismissal For Failure To Join A Rule 19 Party**

17 A case will be dismissed if there is an absent party under Rule 19, without whom  
18 relief cannot be granted or whose interest in the dispute is of such a nature that to  
19 proceed without that party could prejudice that party or others. See Hammond v.  
20 Clayton (7<sup>th</sup> Cir. 1996) 83 F.3d 191, 195.

21 The courts are hesitant to dismiss for failure to join absent parties, and will not do  
22 so on a vague possibility that unjoined persons may have an interest in the litigation.  
23 See Sever v. Glickman (D.Conn.2004) 298 F.Supp.2d 267, 275. In ruling on a Rule  
24 12(b)(7) motion to dismiss, the court is to apply the standards of Rule 19(a) to determine  
25 whether joinder is essential and, if so, whether the factors of Rule 19(b) make dismissal  
26 appropriate. See HS Resources, Inc. v. Wingate (5<sup>th</sup> Cir. 2005) 327 F.3d 432, 439. The  
27 court will also accept plaintiff's allegations as true in ruling on the motion, and will draw  
28 all reasonable inferences in the plaintiff's favor. See Rotec Indus., Inc. v. Aecon Group,

1 Inc. (N.D.Ill.2006) 436 F.Supp.2d 931, 933.

2 V.

3 **ARGUMENT**

4 **A. A RULING GRANTING PLAINTIFF'S MOTION TO REMAND BACK TO**  
5 **STATE COURT WILL MAKE DEFENDANT'S 12(b) MOTIONS TO DISMISS**  
6 **MOOT**

7 Plaintiff has pending a motion to remand this case back to State Court on the  
8 grounds that there is no federal question at issue. If the court grants the motion, then the  
9 Commission's motion to dismiss on various grounds will be moot. In this regard, the  
10 Court should rule on the motion to remand first.

11 **B. PLAINTIFF HAS THE CAPACITY TO SUE FOR THE SOUGHT AFTER**  
12 **EQUITABLE RELIEF**

13 **1. The Defendant's Claim Of Lack Of Subject Matter Jurisdiction Is**  
14 **Inconsistent With Its Removal Petition**

15 When the Commission removed this case to the U.S. District Court, it claimed that  
16 federal question jurisdiction exists, because the Tribal Compact forming the basis of the  
17 Commission's duties is governed by federal law. While Plaintiff disagrees with that  
18 contention, the point is that the Commission now asserts in its motion to dismiss that the  
19 Court lacks subject matter jurisdiction, because the Miwok Tribe is not federally  
20 recognized, and that the Compact bars 3<sup>rd</sup> party claims for compensatory damages (See  
21 pg. 2 of Defendant's Motion to Dismiss, paragraphs 1 and 2).

22 These contentions are not only inconsistent with the Commission's position on  
23 removal, but they are factually and legally erroneous.

24 Plaintiff agrees that this Court does not have jurisdiction, but only in the context of  
25 opposing the original removal action. No federal question is at issue, since the Plaintiff  
26 only seeks declaratory and injunctive relief with respect to the Commission's duty under  
27 State law to distribute to Plaintiff its RSTF money.

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1                   **2. The U.S. District Court In Washington D.C. Has recognized Plaintiff**  
 2                   **As Having The Capacity To Sue**

3                   In its Decision, the U.S. District Court in California Valley Miwok Tribe v. The  
 4                   United States (D.C.D.C.2006) 424 F.Supp.2d 197, stated:

5                   “The California Valley Miwok Tribe, an Indian Tribe ‘recognized and  
 6                   eligible for funding and services’ pursuant to Section 104 of the Act of  
 7                   November 2, 1994,...seeks declaratory and injunctive relief against what  
 8                   it calls federal government interference with its internal affairs....”

9                   424 F.Supp.2d at 197. At no time did the U.S. government move to dismiss the Miwok  
 10                  Tribe’s complaint, because the Tribe purportedly lacked the capacity to sue. In its  
 11                  Decision, the U.S. District Court made no mention or ruling that the Tribe had no  
 12                  capacity to sue, even though the Decision contains a factual rendition on how the Tribe  
 13                  reached the point of being recognized by the BIA as “unorganized”, because of the  
 14                  Tribe’s dispute with the BIA over its constitution and the ongoing Tribal leadership  
 15                  dispute. Instead, the U.S. District Court began its written Decision with the undisputed  
 16                  observation that the Tribe filed suit as a Tribe that was “recognized and eligible for  
 17                  funding and services” under federal law.

18               The Commission relies heavily on the U.S. District Court’s Decision in advancing  
 19               various theories in its Motion to Dismiss. Indeed, the Commission has made it clear in  
 20               its brief that one of the main reasons it has decided to withhold RSTF money from the  
 21               Plaintiff, is because of the U.S. District Court’s Decision. Thus, the Commission should  
 22               be estopped from arguing the Plaintiff lacks the capacity to sue in this lawsuit, while at  
 23               the same time trying to reap the benefits of a ruling on Plaintiff’s prior lawsuit where the  
 24               Plaintiff’s capacity to sue was never challenged, but was instead established.

25                   **3. Plaintiff’s Breach Of Contract Damage Claims**  
 26                   **Have Been Dismissed**

27               The Commission further argues that Plaintiff has no capacity to sue for breach of  
 28               contract or compensatory damage claims, because the Compact does not permit such  
 29               claims. This is no longer a valid argument, because the Plaintiff has dismissed its

1 Breach of Contract and Breach of Fiduciary Duty claims. As stated, Plaintiff's suit is for  
2 equitable relief with respect to the Commission's duties to disburse RSTF money under  
3 the facts in this case.

4 **4. The Federal Government Has Never Withdrawn Its**  
5 **Recognition Of The Miwok Tribe**

6 Pointing to the U.S. District Court Decision, the Commission argues that because  
7 the federal government purportedly does not recognize the Tribe as "organized", the  
8 Plaintiff lacks the capacity to sue. It further argues that Plaintiff further lacks the capacity  
9 to sue, because the federal government has rejected Sylvia Burley as a person of  
10 authority for the Tribe, based upon a letter dated December 14, 2007 from the BIA  
11 (Defendant's Ex. 2 for Req. for Judicial Notice). These contentions are without merit and  
12 a misreading of both the U.S. District Court's Decision and the BIA letter of December  
13 14, 2007.

14 The U.S. District Court in Miwok, supra, made no ruling or determination that the  
15 Miwok Tribe was not federally recognized. Nor did it rule that the Tribe had no  
16 government-to-government relationship with the federal government. Its Decision was  
17 limited to whether the Tribe in its suit had a legally cognizable claim for "federal  
18 government interference with its internal affairs". No other issue was before the Court at  
19 that time.

20 As stated, the Miwok Tribe is a federally recognized Tribe, not because of what  
21 the BIA says about it. Rather, it is a recognized Tribe by virtue of it having been placed  
22 on the "Federally Recognized Indian Tribe List Act of 1994". (See page 2 of Decision,  
23 attached as Plaintiff's Exhibit). The Commission has not shown that the federal  
24 government has ever removed the Tribe from that list.

25 The Commission then points to a letter dated December 14, 2007 from the BIA to  
26 Sylvia Burley, returning her application for the Tribe for P.L. 93-638 money, i.e., federal  
27 contract money. (Defendant's Ex. 2). It also attaches an appellant brief from an attorney  
28 from the BIA, wherein the attorney argues that the December 14, 2007 letter from the

1 BIA to Burley “makes it clear” that Burley is not the Tribe’s official representative.  
 2 (Defendant’s Ex. 1). The appellant brief (Defendant’s Ex. 1) is, however, purely  
 3 argumentative and cannot be considered as fact. It lack proper foundation and is  
 4 hearsay. Moreover, the appellate counsel’s statements are not an official statement of  
 5 policy from the BIA. Indeed, the December 14, 2007 letter from the BIA doesn’t say that  
 6 the BIA does not consider Burley anymore as a person of authority for the Miwok Tribe.

7 The December 14, 2007 letter from the BIA only says that the BIA could not  
 8 accept the application for 638 funding for the Tribe, because the Tribe was not  
 9 “organized”. It stated:

10 “...[C]onsideration to contract federal funds to operate Bureau of  
 11 Indian authorized programs will only be given to an application  
 12 submitted by [a] federally recognized tribe with a recognized governing  
body...”

13 Because we do not recognize any current governing body for the  
 14 California Valley Miwok Tribe, we are unable to accept the proposal for  
 the above stated reason...” (Emphasis added).

15 The Commission’s interpretation of this letter is strained at best. The letter says nothing  
 16 about Ms. Burley having no authority to act for the Tribe.

17 As shown by this letter, disbursement of P.L. 93-638 federal funds requires (at  
 18 least according to the BIA) that the recipient Tribe be organized. Being merely federally  
 19 recognized is apparently not sufficient. While the Miwok Tribe is indeed federally  
 20 recognized, it presently suffers from being unorganized. It is a federally recognized,  
 21 “unorganized” Tribe, with Silvia Burley as its representative. However, according to the  
 22 BIA, in order for the Tribe to receive 638 funding, it must be organized. The reason for  
 23 this obviously is because the Tribe must enter into a contract with the BIA for such  
 24 funding. (See Letter of December 14, 2007 from BIA, first paragraph: “...we are  
 25 returning your application to contract FY 2008 funding from the Bureau of Indian Affairs,  
 26 under P.L. 93-638...). No such requirement exists with respect to RSTF money under  
 27 California State law. Indeed, Non-Compact Tribes do not have to enter into a contract  
 28 each year, or at all, in order for them to receive RSTF money. It is for this reason that

1 the Commission cannot refuse to continue RSTF disbursements to the Tribe because  
 2 the Tribe is not organized. That may be a purported reason for the BIA not to contract  
 3 with the Tribe for 638 funding, but it cannot be the reason for the Commission to withhold  
 4 RSTF money. The standards and requirements are entirely separate and different. The  
 5 source of funding for 638 funding is federal, whereas the source of funding for RSTF  
 6 money is the California State Treasury. "Apples and oranges".

7 As stated more fully below, the Tribe's status as "unorganized" does not disqualify  
 8 it from RSTF disbursements. Indeed, the Commission has admitted as much in its prior  
 9 pleading in opposing Yakima Dixie's TRO. It paid out these moneys to Sylvia Burley as  
 10 the Tribe's authorized or "official" representative. It has pointed to no evidence that the  
 11 BIA has stated that it no longer considers Ms. Burley as the Tribe's official  
 12 representative. According to the Compact, the Commission must distribute the  
 13 accumulated RSTF money to Ms. Burley, whether or not the Tribe is "organized", as long  
 14 as it can be shown that Ms. Burley remains as the Tribe's representative. (See Section  
 15 2.21 of Compact: "'Tribe' means a federally-recognized Indian tribe, or an authorized  
 16 official or agency thereof"). The Compact does not require that the Tribe be organized in  
 17 order to qualify for RSTF money.

18 **C. PLAINTIFF IS NOT SEEKING A DETERMINATION OF ITS STATUS AS**  
 19 **A TRIBE IN THIS ACTION**

20 **1. The Defendant has Misrepresented The Holding In The U.S.**  
 21 **District Court Decision In "Miwok v. USA"**

22 In an effort to bring in a res judicata argument where none exists, the Commission  
 23 makes several misstatements in its moving papers. With respect to the U.S. District  
 24 Court Decision in "Miwok v. USA", the Commission falsely asserts that the Court "upheld  
 25 the federal government's determination that [Sylvia] Burley and her government did not  
 26 represent the Miwok and that ruling is now on appeal." (pg. 8, lines 23-24 of Defendant's  
 27 P/A's). It then goes on to argue:  
 28



1 “A decision in that case will have res judicata effect on issues  
 2 regarding the status of Burley’s government and her capacity  
 3 to represent the Miwok because res judicata bars relitigation in a  
 4 subsequent proceeding of all issues that were raised or that could  
 5 have been raised in a prior proceeding between the parties....”

6 (Ibid. at lines 26-28, and line 1, page 9). A quick and cursory review of that Decision will  
 7 reveal that the U.S. District Court made no such holding or finding.

8 Moreover, nowhere in the Complaint in this case does the Plaintiff seek a judicial  
 9 determination concerning its status as a Tribe. That is simply not what this case is  
 10 about.

## 11 **2. Plaintiff’s Complaint Focuses Solely On The Commission’s** **Duty Under State Law To Distribute RSTF Money To Plaintiff**

12 As stated, the main thrust of Plaintiff’s lawsuit is for equitable relief in the form of a  
 13 judicial declaration of Plaintiff’s rights to RSTF money and the Commission’s duties to  
 14 distribute such funds to the Plaintiff, as well as an injunction restraining the Commission  
 15 from withholding these moneys and compelling distribution. There are no other issues to  
 16 be decided.

17 Specifically, Plaintiff does not ask the Court to make a judicial determination of its  
 18 Tribal status. The Commission had made that mistake previously, when it filed an  
 19 interpleader action. The State Superior Court dismissed that suit, because, instead of  
 20 seeking a judicial determination of its duties with respect to disbursement of the RSTF  
 21 funds, the Commission only sought a judicial determination of the Tribe’s status as a  
 22 federally recognized tribe, and who was authorized to represent it. (See Minute Order on  
 23 Ruling dismissing the Commission’s interpleader action, Plaintiff’s Ex. 3). The Plaintiff is  
 24 not doing so here, however.

### 25 **D. PLAINTIFF MERELY SEEKS A JUDICIAL DETERMINATION OF THE** 26 **COMMISSION’S DUTY TO PAY RSTF MONEY TO “UNORGANIZED”,** 27 **FEDERALLY-RECOGNIZED, NON-COMPACT TRIBES, OR THEIR** **AUTHORIZED REPRESENTATIVE**

28 It is undisputed that Plaintiff is a federally-recognized tribe. The Commission has



1 admitted it is. (See the Declaration of Gary Qualset, Defendant's Ex.3, Appendix). The  
 2 U.S. District Court in "Miwok v. USA" concluded it was in its Decision (See 1<sup>st</sup> paragraph  
 3 of the Decision). The BIA has never withdrawn its recognition of the Tribe. Most  
 4 importantly, the Tribe remains on the "Federally Recognized Indian Tribe List Act of  
 5 1994", and has never been taken off of that list.

6 The dispute here centers around the Commission's mistaken belief that it cannot  
 7 continue paying Plaintiff RSTF money, because the Tribe is not "organized" and thus  
 8 purportedly not entitled to federal P.L. 93-638 contract money from the BIA. While that  
 9 may be the purported standard for the BIA in granting 638 federal contract money to  
 10 various Indian Tribes, that is not the standard for the Commission to be guided by in  
 11 distributing RSTF money from the State Treasury. The Compact contains no provision  
 12 requiring a Non-Contract Tribe to be "organized" as a condition for entitlement to RSTF  
 13 money. Indeed, Non-Compact Tribes are not required to enter into a contract with the  
 14 Commission or the State to get RSTF money. The Plaintiff seeks a judicial declaration  
 15 that the Commission must release its withheld RSTF money to the Tribe via Sylvia  
 16 Burley, the Tribe's authorized representative, in the same manner as it has been doing  
 17 before.

18 **E. THE COMPACT DOES NOT BAR PLAINTIFF, A NON-COMPACT**  
 19 **TRIBE, FROM SUING THE COMMISSION FOR EQUITABLE RELIEF**

20 The Commission argues that the Compact bars the Plaintiff from enforcing the  
 21 Compact as a third-party beneficiary. This contention is misleading.

22 Section 4.3.2(a)(i) specifically provides in pertinent part as follows:

23 "...Non-Compact Tribes shall be deemed third party beneficiaries of  
 24 this and other compacts identical in all material respects...."

25 Section 15.1 then reads as follows:

26 "Third Party Beneficiaries. Except to the extent expressly provided  
 27 under this Gaming Compact, this Gaming Compact is not intended to,  
 28 and shall not be construed to, create any right on the part of a third  
 party to bring an action to enforce any of its terms. (Emphasis added).

1 The right to enforce any of the terms of the Compact is limited to the State, the Compact  
2 Tribes, and the Non-Compact Tribes as third party beneficiaries under Section  
3 4.3.2(a)(i).

4 Suit is limited to equitable relief, in the form of injunctive and declaratory relief,  
5 and specific performance. (See Section 9.4(a)(2) of Compact).

6 The bar to third party suits under Section 15.1 of the Compact, does not extend to  
7 Non-Compact Tribes seeking payment of RSTF money under Section 4.3.2, because  
8 Section 15.1 specifically provides: "Except to the extent expressly provided under this  
9 Gaming Compact..." Section 4.3.2 is one of those exceptions, thus permitting Plaintiff to  
10 sue the Commission for declaratory relief with respect to the Tribe's entitlement to RSTF  
11 money.

12 The Plaintiff, by virtue of its dismissal of its breach of Contract and Breach of  
13 Fiduciary Duty claims, no longer seeks (and really never did seek) compensatory  
14 damages. Thus, by its own terms, the Compact permits the Plaintiff, a Non-Compact  
15 Tribe, deemed to be a third-party beneficiary under Section 4.3.2 of the Compact, to sue  
16 for equitable relief to enforce the terms of the Compact. However, here Plaintiff is not  
17 technically doing that, even though it is entitled to do so. Instead, Plaintiff is suing for  
18 equitable relief against the Commission, seeking a judicial determination of the  
19 Commission's duties regarding disbursement of RSTF money. The terms of the Compact  
20 are indirectly implicated, because they serve as a basis for the Commission's duties.  
21 Having the Plaintiff categorized as a third-party beneficiary is more of an effort to provide  
22 Non-Compact Tribes with standing to obtain equitable relief with respect to the RSTF  
23 money.

24 The Plaintiff is not attempting to enforce the Compact to obtain monetary or  
25 compensatory damages.

26 ///

27 ///

28 ///

**F. PLAINTIFF'S BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY CLAIMS HAVE BEEN DISMISSED, MAKING THE COMMISSION'S "NO COMPENSATORY DAMAGE" ARGUMENT MOOT**

Since the Plaintiff has dismissed its Breach of Contract and Breach of Fiduciary Duty claims, the Commission's argument in Section III of its brief is moot.

As stated, the Compact permits the Plaintiff to sue for third-party equitable relief, but not for third-party compensatory damages. (See Sections 15.1, 4.3.2(a)(i), and 9.4(a)(2)).

**G. PARTIES TO THE TRIBE'S LEADERSHIP DISPUTE ARE NOT NECESSARY AND INDISPENSABLE PARTIES**

**1. The Commission Has Already Admitted That Its Decision To Distribute RSTF Money Should Not Be Affected By The Present Tribal Leadership Dispute**

The Commission argues that parties to the Tribal leadership dispute need to be joined as "necessary and indispensable parties" under Rule 19, because purportedly these "other parties claim a right to represent the Miwok [Tribe] and, hence claim a right to distributions from the RSTF", citing paragraphs 7 and 50 of the Complaint. (Defendant's P/A's, pg. 14, lines 5-6). This contention is without merit and a gross misreading of the Plaintiff's Complaint.

Nowhere in paragraphs 7 or 50, or anywhere in the Complaint, is there any allegation that certain individuals involved in the Tribal leadership dispute are claiming a right to distribution from the RSTF. The Commission's representation in that regard is completely false.

In addition, the Commission falsely asserts that "the complaint alleges that certain DOE defendants have also claimed leadership of the Miwok[Tribe]." (Defendant's P/A's, pg. 14, lines 20-21).

Moreover, the Commission has already previously admitted in Court papers that its decision to distribute RSTF money to the Plaintiff should not, and cannot, be affected by the present Tribal leadership dispute. In a sworn declaration, Gary Qualset, the then Deputy Director of the Licensing and Compliance Division of the Commission, stated in

2004 as follows:

\*\*\*

Until recently, when a tribal leadership dispute has arisen, and a BIA leadership decision has been administratively appealed, it has been the practice of the Commission to hold RSTF checks during the pendency of the appeal.

Recently, the Commission determined that it should change this practice to conform to the practice of the BIA and send the RSTF funds to the Tribe via the tribal representative with whom the BIA conducts government-to-government relations on an ongoing basis, regardless of whether there is a challenge to tribal leadership.

It appears to the Commission that Sylvia Burley is presently recognized as the tribal representative for the California Valley Miwok Tribe.

(Declaration of Gary Qualset, pg. 3, paragraph 11-13, Defendant's Ex. 3).

**2. The Commission's Duty To Disburse RSTF Money Has Nothing To Do With The Merits Of The Tribal Leadership Dispute**

As shown, the Compact does not bar the Plaintiff from receiving RSTF funds because it is "unorganized". So long as it is a federally-recognized Tribe with an official representative, it is entitled to RSTF money, and the Commission has no discretion to withhold such funding, where such facts are established. In addition, nothing in the Compact bars a Non-Compact Tribe from receiving RSTF funds, because of an existing Tribal leadership dispute.

As stated, Plaintiff's suit focuses on the Commission's duty to disburse RSTF money to Non-Compact Tribes who are "unorganized". It does not seek to enforce the terms of the Compact for money damages, nor does it seek to resolve a Tribal leadership dispute. Accordingly, the parties to the present Tribal leadership dispute are not "necessary and indispensable parties" under Rule 19. See People ex rel. Lungren v. Community Development Agency (1997) 56 CA4th 868.

The provisions in California's Compulsory Joinder Statute, CCP Section 389, are derived from Rule 19 of the FRCP. As a result, California State Courts look to federal precedents in resolving joinder disputes. Countrywide Home Loans, Inc. v. Superior

1 Court (1999) 69 CA4th 785, 792. Such State Court cases are therefore helpful in  
2 resolving joinder disputes in federal court, where remand is likely for improper removal.

3 The case of Community Redevelopment Agency, is instructive. There, a certain  
4 redevelopment agency for Palm Springs, California ("Agency") contracted with the Agua  
5 Caliente Band of Cahuilla Indians ("Tribe") to sell certain land in Palm Springs to the  
6 Tribe to build gambling casinos, in exchange for a share of the gambling proceeds.  
7 Because the contract essentially prevented the State from exercising complete civil and  
8 criminal jurisdiction over the transferred land and casino operations, the State Attorney  
9 General filed a complaint to set aside the contract.

10 The Agency in Community Redevelopment Agency, supra, aligning itself with the  
11 interests of the Tribe, demurred, and argued that the Tribe was a necessary and  
12 indispensable party to the "contract". It argued because of the Tribe's sovereign  
13 immunity status, the action had to be dismissed. The Court of Appeal rejected this  
14 contention and reversed the trial court's judgment of dismissal for nonjoinder of the  
15 Tribe. It held that while the Tribe was a "necessary" party (because the suit was to set  
16 aside a contract to which it was a party), "equity and good conscience" dictated that it  
17 was not an indispensable party. The Court reasoned that the Tribe was not prejudiced  
18 by nonjoinder, largely because the sought after relief only addressed the scope of the  
19 Agency's authority (in entering into such contracts and putting public land beyond the  
20 reach of the State's police power), and thus would only incidentally impact or adjudicate  
21 the Tribe's interests. Moreover, public policy or "the interest of the public" weighed in the  
22 Court's decision, in light of the Agency's attempt to "permanently relinquish [the State's]  
23 interest in property within its control." 56 CA4th at 883.

24 Similarly, plaintiff's sought-after relief merely addresses the duty of the  
25 Commission to disburse RSTF money. It has nothing to do with any Tribal leadership  
26 dispute. Neither does Plaintiff's suit seek a determination of the Tribe's status.

27 For these reasons, the parties to the Tribe's present leadership dispute are not  
28 necessary or indispensable parties.



**CERTIFICATE OF SERVICE**

**Case Name:** California Valley Miwok Tribe v. California Gambling Control Commission

**Court:** United States District Court, Southern District,  
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 20, 2008**, I electronically filed the following documents:

- 1. PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

**ELECTRONIC MAIL NOTICE LIST**

I have caused the above-mentioned document(\*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

[Peter.Kaufman@doj.ca.gov](mailto:Peter.Kaufman@doj.ca.gov)

**MANUAL NOTICE LIST**

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on **February 20, 2008**, at San Diego, California.

Manuel Corrales, Jr.

Declarant

s/ Manuel Corrales, Jr.

Signature